

**AGREEMENT AMONG THE CITY OF COMMERCE CITY, BUFFALO HIGHLANDS
METROPOLITAN DISTRICT, BUFFALO HIGHLANDS, LLC, AND C. LARSON FAMILY
FARMS, INC, FOR THE CONSTRUCTION AND FUNDING OF CERTAIN IMPROVEMENTS
TO 96TH AVENUE AND THE DEDICATION OF CERTAIN LANDS**

This AGREEMENT (the “Agreement”) is made and entered into effective this ___ day of _____, 2013, by and among the CITY OF COMMERCE CITY, a Colorado home rule municipality whose principal business address is 7887 East 60th Avenue, Commerce City, Colorado 80022 (the “City”), BUFFALO HIGHLANDS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado whose principal business address is 141 Union Boulevard, Suite 150, Lakewood, CO 80228 (the “District”), BUFFALO HIGHLANDS, LLC, a Colorado limited liability company whose principal business address is 222 Milwaukee Street, Suite 300, Denver, CO 80206 (“Owner”), and C. LARSON FAMILY FARM, INC., a Minnesota corporation whose local business address is 222 Milwaukee Street, Suite 209, Denver, CO 80206. (“Larson”).

WHEREAS, Owner, plans to develop the Buffalo Highlands Subdivision within the City (the “Property”);

WHEREAS, as a prerequisite to obtaining City approval for such development, and in accordance with the City’s Land Development Code (the “LDC”), Owner must construct certain public improvements to 96th Avenue in the vicinity of the Property, as set forth more specifically on **Exhibit A**, attached hereto and incorporated herein by this reference (the “Improvements”);

WHEREAS, the District was formed in 2002 for the purpose of constructing and funding various improvements at the Property including the Improvements;

WHEREAS, the 60-acre “old race track” site identified on the Buffalo Highlands PUD Zone Document as “Parcel K” is in need of remediation and restoration;

WHEREAS, the District has been assigned responsibility for construction of the Improvements, but is currently not capable of financing such construction;

WHEREAS, the City requires that the Improvements be constructed in the near term to serve both the Property and other residents of the City;

WHEREAS, Owner and the City previously entered into two (2) agreements involving the Property regarding land dedication and the funding and construction of some portion or all of the Improvements: that certain Agreement between Buffalo Highlands, LLC, and the City of Commerce City, dated December 20, 2004 (the “2004 Agreement”), and that certain Financing Agreement between Buffalo Highlands, LLC, and the City of Commerce City, dated December 20, 2004 (the “Financing Agreement”), (collectively referred to hereinafter as the “Prior Agreements”);

WHEREAS, the City has advanced all funds identified in the Financing Agreement as City obligations;

WHEREAS, Owner and the District have entered into assignments of certain portions of the Prior Agreements from Owner to the District, which assignments have been approved by the City; and

WHEREAS, the parties have entered into this Agreement to consolidate the Prior Agreements and provide for (i) the present funding and construction of the Improvements; (ii) the consummation of the

previously required and agreed-to land dedications; and (iii) the remediation of certain land to be dedicated to the City.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein, and for other good and valuable consideration, the sufficiency and receipt of which is expressly acknowledged, the parties hereby agree as follows:

I. CONSTRUCTION OF IMPROVEMENTS

A. Project Overview; Assignment of Prior Agreements' Obligations. The following is a general description of the nature of the Improvements (sometimes referred to hereinafter as the "Project"). Specific design and engineering requirements and standards are set forth separately in this document and Exhibit A. The Improvements consist of the following:

1. A four-lane bridge over Second Creek in the 96th Avenue alignment (the "Bridge");
2. The grading required for construction of a four-lane, 96th Avenue road segment between Nucla Street and Tower Road (the "New 96th Ave. Segment"); and
3. The paving of the north two lanes of the New 96th Ave. Segment.
4. To the extent the requirements, responsibilities and obligations contained in the Prior Agreements (the "Prior Agreements' Obligations") are satisfied by the District's performance of its obligations set forth in this Agreement, the Prior Agreements' Obligations are hereby assigned to and are the responsibility of the District and Owner shall be relieved of any such responsibility.

B. Construction.

1. The District shall construct, at its sole cost and expense (except as otherwise expressly provided herein), the Improvements in accordance with the City of Commerce City Engineering Construction Standards and Specifications.
2. The Bridge shall be of the same design as the 104th Avenue bridge over Second Creek, as more specifically set forth in Exhibit A. The entire Bridge, except for the girders and decking for the south two lanes, will be constructed by June 1, 2014, including stone facing and towers.
3. All construction shall comply with the standards and requirements for 4-lane arterial roadways as set forth in the City of Commerce City Engineering Construction Standards and Specifications.
4. Construction of the Improvements shall be completed such that final acceptance thereof by the City shall occur not later than June 1, 2014. The District's failure to obtain final acceptance of the Improvements by June 1, 2014, shall constitute a breach of this Agreement.

C. Phasing.

1. The Improvements may be installed in phases as herein provided.
 - a. "Phase I" will include construction of the road segment from Tower Road to sixty feet (60') west of the westernmost entrance to the Property.

- b. “Phase II” will include the construction of the Bridge and channel work on Second Creek.
 - c. “Phase III” will include the construction of 96th Avenue from Nucla Street to Phase I.
2. Phases I and II may commence concurrently. However, it is acknowledged that work on Phase II will likely continue beyond the completion of Phase I.

II. CONSTRUCTION MANAGEMENT

A. Construction Manager – Responsibilities. The City and the District shall jointly agree to, hire and supervise, a third-party construction manager for the project (the “Construction Manager”).

1. Except as otherwise provided herein, the Construction Manager shall manage all aspects of the Project.
2. The Construction Manager will manage the bidding process, including, but not limited to, the following:
 - a. Solicit bids for the Project;
 - b. Conduct the pre-bid meeting and respond to bidders’ questions;
 - c. Open and evaluate the bids;
 - d. Make a recommendation to the City and the District as to the lowest responsible bidder(s).
3. The Construction Manager shall hire a materials testing consultant for all project testing.

B. Design Engineer – Design Plans; Bid Documents.

1. The District’s design engineer (the “District Engineer”) shall provide design consultation to the Project’s general contractor (the “General Contractor”) and shall prepare the Project design plans for review and approval by the City.
2. The City shall provide template bid documents to the District Engineer, which shall prepare the bid documents and bid package for the Construction Manager, subject to the City’s review and approval.
3. The City shall review the Project design, bid documents and bid package and may approve, approve with changes or conditions, or reject with direction for re-submittal the Project design, bid documents and/or bid package.

C. Construction Contract; General Contractor.

1. Subject to City approval, the District shall hire, and be responsible for making payments to, the General Contractor.
2. The contract awarded to the General Contractor for construction of the Project shall be the City's standard construction contract, including all insurance and indemnification provisions and bonding requirements, modified for the purposes of this Agreement and expressly providing that the City shall be a third party beneficiary thereunder.
3. The General Contractor shall provide for construction surveying either directly or through a subcontractor.

D. Invoice and Change Approval.

1. All construction invoices shall be submitted to the Construction Manager for review and approval. In the event the Construction Manager disapproves any part or all of an invoice, the Construction Manager may (i) return such invoice to the submitting party with directions and/or conditions for re-submittal; or (ii) seek input from the City and the District regarding the invoice.
2. All invoices approved by the Construction Manager shall be forwarded to the City for review and approval. Invoices approved by the City shall be signed by it and be sent to the District Engineer for review and final approval. Invoices approved by the District Engineer shall be signed by it and sent to the District for review, approval and payment.
3. Subject to subsection D.4. below, approval of change orders shall be the joint responsibility of the City and the District.
4. The City shall have sole discretion regarding any design changes or field changes to the Improvements except where such changes result in increased Project costs, in which event, the City shall confer with the District prior to authorization thereof.

E. Inspection; Final Acceptance of Improvements.

1. All inspections shall be conducted by both City staff and a third party inspector (the "Inspector") engaged by the City. The cost of the Inspector shall constitute a Project expense, but in no event shall the cost chargeable to the District exceed six percent (6%) of the total Project cost.
2. The City and the Inspector shall have the authority to issue stop-work orders on the Project upon prior notice to the District.
3. Final inspection and final acceptance of the Project shall be made only upon completion of the entire Project, and not until the remediation and restoration of Parcel K in accordance with the requirements contained herein, and the subsequent dedication of Parcel K to the City, as set forth below, is completed.

III. LAND DEDICATION; PARCEL K REMEDIATION

A. Parcel K Remediation; Illegal Dumping.

1. Remediation and Restoration. The District shall remediate and restore, as set forth herein, the 60-acre, “old race track” site identified on the Buffalo Highlands PUD Zone Document as “Parcel K.”

a. Prior to the commencement of any remediation and restoration of Parcel K, the District shall:

i. Provide to the City an updated Phase I/II environmental assessment

ii. Submit a proposal to the City detailing how the District will: (a) remove any and all remnants of the former race tracks and any associated debris existing on the site; (b) re-grade all portions of the site as necessary to cause the site to appear natural (as determined by the City); (c) re-vegetate all disturbed areas and areas void of vegetation; and (d) address any remaining issues identified in the updated Phase I/II environmental assessment.

iii. Provide to the City a drainage report and modeling to demonstrate restoration of floodplain to conditions approximate to those that existed prior to construction of the race tracks and to demonstrate compliance with applicable city/state/federal floodplain requirements.

b. The general standard for the clean-up of Parcel K is compliance with all applicable the City, State and Federal rules, regulations, ordinances and statutes.

c. To the extent authority exists, Owner and the District shall require any oil and gas owners on the Property to conduct remediation and restoration related to their, or prior occupants’, activities on the Property.

d. Remediation and restoration of Parcel K shall be completed not later May 31, 2014.

2. Illegal Dumping. The District shall prevent illegal dumping on the Property and, until such time as Buckley Road is closed to vehicular traffic or not later than thirty (30) days after final acceptance of the Improvements, whichever occurs first, the District shall be responsible for any remediation and restoration of the site (to its condition prior to the illegal dumping) made necessary by any such dumping. Such remediation and restoration shall include, but not be limited to, the removal of, whether existing on the surface of the Property, within the soil or underground: any junk or waste items; hazardous waste; petroleum products; and contaminated soil.

B. Easement.

1. Grant. Larson hereby grants to the District an easement upon Parcel K (the “Easement”) for the purposes of access, remediation, restoration, environmental testing and sampling and such other activities necessary to carry out the intent of this Agreement.

2. Term. The Term of the Easement shall commence on the date first written above and end upon the earlier of the date upon which Buckley Road is closed to vehicular traffic or thirty (30) days after final acceptance of the Improvements.

C. Dedication.

1. Larson shall dedicate Parcel K to the City for use as park and/or open space to satisfy any park and open space requirements for the Property as established by the LDC.
2. Owner shall dedicate to the City the 67-acre Second Creek floodplain identified on the Buffalo Highlands PUD Zone Document as “Parcel J.”
3. Representatives of Owner and the District shall contact the owners of the additional land needed for 96th Avenue right-of-way regarding the potential for donation to the City of such land. To the extent such necessary right-of-way is not donated to the City, the cost of acquisition thereof by the City shall constitute a Project expense, payable by the District within thirty (30) days of receipt of any invoice therefor from the City, which expenses may be paid from the Escrow Account, the Solid Waste Fund or Loan proceeds.

IV. FUNDING – REIMBURSEMENT

A. Funding – Sources; Amounts; Disbursement.

1. Park Fees – Escrow.

- a. There exists in the escrow account established by the 2004 Agreement (the “Escrow Account”) approximately \$350,000.00, which may be used for preliminary engineering for the Improvements, the land acquisition required under Section III.C.3. herein and Parcel K remediation and restoration (collectively, the “Permitted Expenses”).
 - b. Owner, the City and the District hereby agree that the District is authorized, and is hereby assigned the right, to draw on the Escrow Account for the purposes set forth herein, and to the extent necessary, the Financing Agreement is hereby amended to so provide. To the extent any amounts remain in the Escrow Account following payment of the Permitted Expenses, such amounts will be disbursed to the District for construction of the Improvements.
 - c. The City shall no longer collect “Excess Park Fees” for placement into the Escrow Account for future bridge construction as set forth in the 2004 Agreement.
 - d. The City shall not collect from the District or residential builders within the District, and the District or residential builders within the District shall not owe to the City, any park fee-in-lieu payments, nor shall the District be required to dedicate any park land to the City in relation to Parcels A, B, C, D, E, F, G and H as such Parcels are identified in the Buffalo Highlands PUD Zone Document.
2. Solid Waste Fund. The City agrees to contribute \$500,000.00 to the Project from its Solid Waste Fund. Upon depletion of the existing Escrow Account funds to zero (0), the City shall disburse Solid Waste Fund monies to the District for the Permitted Expenses and if there are any funds remaining after payment of the Permitted Expenses, such remainder may be used to pay construction costs of the Improvements as such are approved by the City and the District.

3. Loan.

a. Amount. The City shall loan to the District an amount currently estimated at \$5,500,000.00 (the "Loan"). The actual loan amount may vary, depending upon the cost of Project design work, construction bids and the cost of Parcel K restoration paid out of the escrow fund as discussed below.

b. Terms. The terms of the Loan are set forth on the Term Sheet attached hereto as **Exhibit B** and incorporated herein by this reference, and in that certain Loan Agreement between the City and the District on or before June 1, 2013. It shall be a condition of this Agreement that the Loan Agreement is executed as herein provided, and the failure to enter into the Loan Agreement in compliance herewith shall constitute a material and irreconcilable breach of this Agreement.

c. Disbursement. The District may draw down the Loan in increments necessary to fund construction progress. Such draws shall occur as construction payments are approved by the City and the District. The District will not be allowed to draw on the Loan until the Solid Waste Fund monies have been entirely depleted.

4. Road Impact Fees. The City will apply to the Project the Road Impact fees generated by the Buffalo Highlands development.

a. As Road Impact fees are collected from builders within the Buffalo Highlands development, the City will complete its quarterly accounting review of the Road Impact fees and will disburse to the District the amount of Road Impact fees collected from the contractors pulling building permits for use within the Buffalo Highlands development.

b. As described in **Exhibit A**, the Road Impact Fees will be pledged to the payment of the Loan.

5. Adams County Funding. The City agrees to contact Adams County in an effort to obtain additional Project funding from the Payment In Lieu of Tax ("PILT") money paid to Adams County by the federal government for the Arsenal and National Wildlife Refuge. In the event Adams County agrees to contribute funds to the Project, such contribution will be used to pay the Loan.

B. District Contribution Constitutes Owner's Contribution.

1. The District's financial contribution to the Bridge and the initial two-lane construction or 96th Avenue shall constitute Owner's contribution to the eventual allocation of the full build-out of 96th Avenue (the four-lane construction) cost and, if approved by the City Council, any upfront contributed cost in excess of the District's calculated contribution will be reimbursed by the City from contributions made by other properties in the vicinity.

2. City staff will recommend to the City Council that the City require other properties in the vicinity benefitting from the Improvements to contribute to the cost of the Improvements based upon a proration of the total cost.

V. MISCELLANEOUS

A. Building Permits.

1. The City shall allow Owner to obtain building permits, for model homes only, prior to the completion of the Project; provided, however, that the City shall not issue any Certificates of Occupancy for any model home before Phase I is completed.

2. Prior to completion of Phase I, the issuance of building permits within the Development for homes to be held out for sale will be at the sole and absolute discretion of the City.

B. Notices. Written notices required under this Agreement and all other correspondence between the parties shall be directed to the following and shall be deemed received when hand-delivered or three (3) days after being sent by certified mail, return receipt requested:

If to the City:

Deputy City Manager or Finance Director
City of Commerce City
7887 East 60th Avenue
Commerce City, CO 80022

If to the District:

Buffalo Highlands Metropolitan District
141 Union Boulevard, Suite 150
Lakewood, CO 80228

With a copy to:

McGeady Sisneros, P.C.
450 East 17th Avenue, Suite 400
Denver, Colorado 80203
ATTN: Mary Jo Dougherty

If to Owner:

Larry Lutrell
Buffalo Highlands, LLC
222 Milwaukee Street, Suite 300
Denver, CO 80206

If to Larson:

Larry Lutrell
C. Larson Family Farm, Inc.
222 Milwaukee Street, Suite 300
Denver, CO 80206

C. Miscellaneous Legal Provisions.

1. Independent Contractor; No Partnership or Agency. Notwithstanding any language in this Agreement or any representation or warranty to the contrary, the relationship between the District and the City shall be as independent contractors, and neither the City nor the District shall be deemed or constitute an employee, servant, agent, partner or joint venturer of the other.

2. No Third-Party Beneficiaries. It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement shall be strictly reserved to the parties. It is the express intention of the parties that any person other than the City and the District shall be deemed to be only an incidental beneficiary under this Agreement.

3. No Assignment. The District shall not assign this Agreement without the City's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed.

4. No Waiver. The waiver of any breach of a term, provision or requirement of this Agreement shall not be construed as or deemed a waiver of any subsequent breach of such term, provision or requirement or of any other term, provision or requirement of this Agreement.
5. Governing Law and Venue; Recovery of Costs. This Agreement shall be governed by the laws of the State of Colorado. Venue for state court actions shall be in the 17th Judicial District in Adams County, Colorado, and venue for federal court actions shall be in the United States District Court for the District of Colorado. In the event legal action is brought to resolve any dispute among the parties related to this Agreement, the prevailing party in such action shall be entitled to recover reasonable court costs and attorney fees from the non-prevailing party.
6. Governmental Immunity. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections or other provisions of the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et seq.*
7. Entire Agreement; Binding Effect. This Agreement contains the entire agreement of the parties relating to the subject matter hereof and, except as provided herein, may not be modified or amended except by written agreement of the parties. This Agreement shall be binding upon, and shall inure to the benefit of, the parties and their respective heirs, personal representatives, successors and assigns.
8. Time of the Essence. The District acknowledges that time is of the essence in the performance of this Agreement. The District failure to complete any of the obligations contemplated herein during the term of this Agreement, or as may be more specifically set forth in an Exhibit hereto, shall be deemed a breach of this Agreement.
9. Authority. The parties represent and warrant that they have taken all actions necessary to legally authorize the undersigned signatories to execute this Agreement on behalf of the parties and to bind the parties to its terms.
10. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all such counterparts taken together shall be deemed to constitute one and the same instrument.
11. Headings. Paragraph headings used in this Agreement are for convenience of reference and shall in no way control or affect the meaning or interpretation of any provision of this Agreement.
12. Severability. In the event a court of competent jurisdiction holds any provision of this Agreement invalid or unenforceable, such holding shall not invalidate or render unenforceable any other provision of this Agreement.

[The remainder of this page intentionally left blank. Signature page(s) follow(s).]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the day and year first written above.

CITY OF COMMERCE CITY

Sean Ford, Mayor

ATTEST:

Laura J. Bauer, CMC, City Clerk

Approved as to form:

Gregory D. Graham, Assistant City Attorney

Recommended for approval:

James Hayes, Deputy City Manager
Department of Public Works

Roger Tinklenberg, Director
Department of Finance

BUFFALO HIGHLANDS METROPOLITAN DISTRICT

By: _____
_____, Board Chair

Attest:

Approved as to Legal Form

Secretary

_____, District General Counsel

